IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

## No. 394

RKO RADIO PICTURES, INC., A CORPORATION; LOEW'S INCORPORATED, A CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION; PARAMOUNT PICTURES, INC., A CORPORATION; BALABAN & KATZ CORPORATION, A CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION (FORMERLY KNOWN AS VITAGRAPH, INC.), A CORPORATION; WARNER BROS. PICTURES, INC., A CORPORATION; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION; AND WARNER BROS. THEATRES, INC., A CORPORATION,

*Petitioners,*

*vs.*

FLORENCE B. BIGELOW, MARION B. KOERBER, JOHN E. BLOOM AND WILLIAM C. BLOOM,

*Respondents.*

## RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

THOMAS C. MCCONNELL,
*Counsel for Respondents.*

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

If petitioners had made a fair summary of the way the issues in this case were decided, the opinion of the United States Circuit Court of Appeals would be an adequate and complete answer to the present petition. That court's recitation of the facts constituting the monopoly and conspiracy in violation of the anti-trust laws is not challenged

on the merits in the petition or in the supporting brief. No offer to prove anything other than what the reviewing court finds to exist was or could have been made in the trial court. The opinion on its face clearly demonstrates that the reviewing court very painstakingly scrutinized and considered not only the pleadings, the voluminous testimony and the numerous exhibits but also the District Court's decree, and applied sound and incontrovertible legal principles in support of its conclusions.

However, in the petition and brief petitioners' counsel have, by the omission of controlling facts, set forth a misleading and inaccurate version of how the case was heard, both in the District Court and in the Circuit Court of Appeals. As we shall point out in this brief, when these omissions are supplied the petition discloses nothing more than a desire to have this Court review the many hundreds of pages of testimony and the numerous exhibits which constitute this record and to have this Court readjudicate the case upon factual issues which have been finally and correctly determined against petitioners.

In the interest of more concisely and directly meeting petitioners' contentions, respondents present their reply to the petition for certiorari in the form of (1) an answer to the petition and (2) a reply to petitioners' supporting brief.

## ANSWER TO PETITION FOR CERTIORARI.

### I.

### The Petition for Certiorari Discloses On Its Face That No Question of Public Importance Is Presented.

The petitioners' "statement" is inaccurate and incomplete in important and controlling respects with refererce to an alleged constitutional question dealt with under Point II hereof. Nevertheless, it shows on its face that the record herein if brought to this Court on certiorari would disclose a controversy between private litigants already adjudicated in a way to protect and further manifest public interests and concerning questions of fact decided against the contentions of petitioners by a District Court Judge, by the Circuit Court of Appeals for the Seventh Circuit, by this Court, and again by the reviewing court on the present appeal.

Under Rule 38 of the rules of this Court and the decisions construing the same it is clear that a petition for certiorari is not to be used merely as a device for affording "the defeated party in the circuit court of appeals another hearing" (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163). To put it another way, the issuance of the writ is properly invoked only to review "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*Layne & Bowler* v. *Western Well Works*, 261 U. S. 387, 392). The present case does not fall in either category.

All that the reasons relied on by petitioners for the issuance of the writ indicate is a dissatisfaction with the

opinion of the Circuit Court of Appeals in holding (Rec. I, p. 326),

> "The defendants were found guilty of one conspiracy in restraint of trade in violation of the Sherman Act, 15 USCA Sec. 1, 2. The jury so found, and the District Court, this Court, and the Supreme Court upheld the finding of conspiracy. The conspiracy so operated that the defendants might hold a picture in the Loop for the benefit of their theatres there, at minimum admission prices to be charged, for such playing time as the defendants might agree upon. When the picture was through playing in the Loop, there was a clearance time of three weeks before it could play elsewhere in Chicago. The picture was then channeled in a series of release weeks through theatres owned and operated by the defendants, and finally in the tenth week after the Loop run, the plaintiffs were permitted to buy the picture in the first week of general release.
>
> "In other words, whatever income that picture was capable of producing was squeezed out of it for the benefit of the defendants, who operated under the unlawful conspiracy, before the defendants permitted the plaintiffs to buy; and notwithstanding the fact that the plaintiffs' theatre had a superior location and equipment and was more attractive than the Maryland Theatre operated by one of the defendants, the defendants would not sell the plaintiffs a picture until the Maryland Theatre had played it. The defendants were able to set the run, clearance, system of release, and the minimum admission prices for every theatre in the Chicago District. No theatre could operate successfully in the Chicago District without the pictures which the defendants controlled.
>
> "Under this oppressive conspiracy, the defendants operated. This conspiracy has been outlawed unequivocally. The defendants have lost a lawsuit."

The above finding made by the Circuit Court of Appeals, at the very least, was equivalent to a ruling, on the rec-

ord before it for review, that there was substantial evidence submitted on the issue of estoppel in support of the District Court's rulings and findings. It was tantamount to a ruling that all of the issues of fact were *res judicata* because, as stated in *Troxell* v. *Del., Lack. & West. R. R. Co.*, 227 U. S. 434, 440; cited by petitioners in their Circuit Court of Appeals brief:

> "Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; * * *."

At the hearing on the estoppel issue in the trial court petitioners conceded that if only one cause of action was presented they were concluded on the facts (Rec. 1, pp. 136-137). Petitioners made the same concession in their Circuit Court of Appeals brief (Rec. 6, p. 52).

They now say that the Circuit Court of Appeals erred in ruling that, "The original complaint stated but one cause of action which, if proved, entitled the plaintiffs to two kinds of relief, namely, damages and an injunction." (Rec. 1, pp. 325-326) and they are now asking this Court to review all the facts and rehear their many arguments to determine whether or not the Court of Appeals erred in affirming the District Court's decree. This, we submit, is not within the province of a petition for certiorari.

## II.

### Petitioners Were Not Denied Due Process of Law by Either the Trial or Reviewing Courts in the Determination of the Equitable Issues.

In order to lend some semblance of substance to their petition for certiorari, petitioners claim that they have

been deprived of constitutional rights by a denial of due process of law in that they had no day in court on the equitable issues. This contention should be viewed against the background of the six printed volumes of this record covering a period of some five years because the merits of the monopoly and conspiracy issues, which governed the granting of both legal and equitable relief, were heard at the trial of the case before the jury.

The Circuit Court of Appeals saw clearly that the granting of equitable relief in this case was ancillary to the decision of the main issues previously reviewed by it and subsequently affirmed here, which had established petitioners' guilt under the anti-trust laws beyond peradventure. The fact that the reviewing court completely reviewed the facts presented in the original record of the trial in no manner supports petitioners' charge that "* * * the court deliberately refused to rule on the questions of law presented by the record * * *." The reviewing court's opinion, however, does manifest a desire on its part to be utterly fair with defendants' ultimate position in this litigation. In other words, to search the record to see whether in the event the doctrine of *res judicata* was not applied there would remain any residuum of merit or equity in petitioners' position. The reviewing court's finding (Rec. 1, p. 327) that "There can be no question of the defendants' guilt in maintaining the unlawful conspiracy alleged in the complaint" answered the question in the negative.

Petitioners now say that this searching of the record constituted a denial of due process by "arbitrarily sustaining the decree upon a ground not presented by the record." In making this contention they ignore the established rule of procedure that in an equity case the reviewing court is free to search the entire record for reasons to affirm (3 Am. Jur. "Appeal and Error" Sec. 825).

Further, petitioners fail to point out that in the Circuit Court of Appeals they said in their reply brief (Rec. 6, p. 301), "The parties therefore seem to be in agreement that this court can and should dispose of the equitable issues in this case finally and completely—by affirmance, if the plaintiffs prevail in every respect, or by modification of the decree to the extent that defendants may prevail upon the issues they have raised." In their original brief they took the position that that Court was entitled to "do what the District Court ought to have done." (Rec. 6, p. 79.) In support of that contention they said (Rec. 6, p. 78). "In any event, there is no occasion to remand the case for any further trial of the equitable issues. The statute under which this case is brought before this Court, 28 U. S. C. A. Sec. 876, specifically provides that this Court, '* * * may affirm, modify or reverse any judgment, decree or order of a district court, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered * * * as the justice of the case may require'."

The reviewing court, apparently in response to petitioners' express invitation, thereupon did examine the entire record to determine "the justice of the case." As appears from petitioners' brief in that court, such an examination of the record was in accord with "due process of law" when petitioners sought a decree in their favor. The procedure became unconstitutional only when it resulted in an affirmance of the District Court's decree. If the suggested procedure had resulted in reversal it would, according to petitioners, have been "due process." This, to say the least, is a novel approach to a constitutional question because it is quite apparent that petitioners not only induced but insisted upon the procedure about which they now complain.

That the position first taken by petitioners, which induced the reviewing court to search the entire record, was sound is shown by the opinion in the case of *Commercial National Bank in Shreveport* v. *Parsons,* 144 F. 2d 231, 240, holding that "An appeal in equity, unless expressly restricted, brings up both law and fact. It is a proceeding in continuation of the original suit. The entire cause is removed to the appellate court and tried *de novo* on the record and evidence in the lower court." The case of *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, cited at page 26 of petitioners' brief to show an alleged conflict with a decision of this Court, is not an equity case but an action at law to which entirely different rules of review apply.

Petitioners' further contention that they did not have their day in court in the District Court on the equitable issue is completely devoid of merit. The original trial started February 14, 1944 (Rec. 2, p. 86) and embraced four weeks of hearing (Rec. 4, p. 2125). As the Circuit Court of Appeals has pointed out (Rec. 1, p. 326), the District Judge heard the evidence as a chancellor while presiding at the jury trial. There is nothing unusual about this procedure. It is accepted practice under the Federal Rules of Civil Procedure. See *Ryan Distributing Corp.* v. *Caley,* 51 F. Supp. 377, 379, where the Court said that in trying legal and equitable issues, "No separate trial is necessary and the Court can within its equity power grant the equitable remedy upon the testimony produced at the jury trial, * * *."

No separate equity trial was ever contemplated by any of the parties, and while the record does not disclose the specific findings of fact tendered at the conclusion of that hearing by the petitioners themselves it does show that they considered the proofs closed. An order drawn and submitted by petitioners themselves at the conclusion of the

jury trial and entered on April 19, 1944, provided (Rec. 4, p. 2179):

> "That defendants be and they are hereby allowed until April 29, 1944, to file objections to the proposed findings of fact and decree served upon them by the plaintiffs on April 15, 1944, *and to file suggested findings of fact and decree on behalf of the defendants.*" (Italics ours.)

Petitioners then closed their case on the equitable issue by filing with the District Court proposed findings and a proposed decree in their favor. The District Court's decision as to the form the equitable relief was to take was postponed by agreement until the jury's verdict had been reviewed (Rec. 4, p. 2096). Upon the affirmance of the judgment in this Court a further hearing was had before the District Court upon the terms of the injunction (Rec. 1, pp. 207-278), and after exhaustive hearings and the filing of briefs (Rec. 1, p. 207) the decree which the Circuit Court of Appeals has affirmed was formulated and entered by the District Court (Rec. 1, p. 278-279). Parenthetically, these undisputed facts are not deemed worthy of recital by petitioners in their "statement."

Certainly petitioners were denied no day in court. The more than three thousand pages, recording over five years of litigation, which constitute the record in this case belie any such assertion.

Nor is there anything to the point now raised for the first time that petitioners were denied constitutional rights when the District Court, sitting as a chancellor, refused to disregard the verdict of a jury in entering its findings of fact. As stated in *Hurwitz* v. *Hurwitz*, 136 F. 2d 796, 798, 799:

> "A defendant has no constitutional right to a trial by the court without a jury."

That Court further held that in such a case a reversal is warranted only where the record shows "* * * that the court using its independent judgment would have been justified in disregarding the verdict".

To have reversed the trial court's findings the reviewing court would have had to have found that the District Court, using independent judgment, would have been justified in disregarding findings necessarily inherent in the jury's verdict and the judgment entered thereon. It actually found that, "There can be no question of the defendants' guilt in maintaining the unlawful conspiracy alleged in the complaint" (Rec. 1, p. 327).

In the instant case the only finding necessary to sustain the decree was that the Chicago system of release was created and maintained by conspiracy in violation of the anti-trust laws and that it threatened future injury to respondents' business "because of the several acts hereinafter specifically enjoined." Entirely aside from any estoppel issue, that finding was made on the independent determination of the trial court, sitting as a chancellor, and having before it the record of the four weeks of testimony it had already heard and all of the documentary evidence admitted at the trial (Rec. 1, pp. 279-280). That finding utterly destroys petitioners' contention made at pages ten to thirteen of their petition that the conspiracy and the acts herein enjoined were never found by the independent judgment of the chancellor to have existed and their further assertion, page 8, that such acts so enjoined were not found by the chancellor to constitute a threat of injury to respondents' business.

Further, the finding that the entire method of doing business described in the reviewing court's opinion was sired in conspiracy was admitted by petitioners themselves to have been adjudicated by the jury (Rec. 5, pp. 345-358).

In their Circuit Court of Appeals brief, petitioners admitted (Rec. 6, p. 52), "For the purpose of determining what issues of fact expressly or necessarily were decided in prior litigation, the court in subsequent litigation may hear evidence. The evidence may include, as it does in this case, the pleadings, testimony, arguments, instructions, briefs and opinions in the prior litigation."

On the previous appeal petitioners attempted to construe the jury's verdict and said (Rec. 5, p. 357): "They [respondents] have, and seek to defend, only a verdict based solely on the theory that the entire 'system of release' was illegal." Petitioners admitted the same thing in this Court (Rec. 5, p. 597). The Circuit Court of Appeals on the prior appeal held petitioners' method of doing business was illegal *as a matter of law* (Rec. 5, p. 443). This Court likewise held it illegal (Rec. 5, pp. 688-689) and the reviewing court has again held it illegal after a re-examination *de novo* of the record (Rec. 1, p. 327).

By their petition for certiorari petitioners now ask that a further review may be granted to afford them the opportunity of arguing that this case should be reversed and remanded to afford the District Court the opportunity of reversing itself, of reversing the Circuit Court of Appeals, and of reversing this Court by finding on this record that a vicious system of oppression and a ruthless price-fixing conspiracy, injurious to respondents and the public alike, constitutes a lawful method of doing business. As the Circuit Court of Appeals intimates in its opinion, it is "hide and seek" arguments of this kind which when followed tend to make the courts and the judicial process look ridiculous.

## III.

**The Terms of the Decree Were Within the Sound Judicial Discretion of the Chancellor and Should Not Be Reviewed on Certiorari.**

The further contentions of petitioners with regard to the terms of the decree itself pose no questions within the scope of a petition for certiorari. As the Circuit Court of Appeals said, "The provisions of the decree complained of were reasonably adapted to breaking up the conspiracy, a part of which was the method of release, and such provisions were therefore properly entered." (Rec. 1, p. 328).

The extended runs in petitioners' theatres, the using up of a pool of "free product" by double featuring, the illegal system of clearance, and the fixing of admission prices were all designed, as the reviewing court stated, to squeeze out all the income in the pictures for petitioners' benefit and obviously threatened injury to respondents' business. *They were all acts done pursuant to a proven conspiracy.* They also were acts manifestly against the public interest. Certainly no public interest can be served by making the equitable relief innocuous. As the reviewing court has held, respondents are entitled to a decree drawn "to meet the acts committed under the conspiracy and threatened." (Rec. 1, p. 328).

The reviewing court properly recognized that it was dealing with a proven violation of the anti-trust laws where it would not direct a recasting of the decree except upon a showing of an abuse of discretion. The trial court was possessed of an intimate knowledge of the workings of this conspiracy based on a record of litigation before it extending over a period of years. As the reviewing court so conclusively shows in its opinion, no abuse of discretion was shown or could be shown on this record.

## Conclusion.

The District Court and the Circuit Court of Appeals have effectively dealt with a proven conspiracy and monopoly which is utterly contemptuous of our way of life and ruthlessly destructive not only of independent property rights but of well-established rights of the public as well. Every day that the effective date of this decree is postponed by further proceedings affords petitioners additional opportunities to damage respondents in their business and to mulct the public through the use of an illegal monopoly and price-fixing scheme. Not only is there no public interest in the grant of the writ of certiorari but every consideration of public interest demands the denial of the petition. Respondents, accordingly, respectfully submit that on the basis of the showing made in the petition for certiorari, as supplemented by the foregoing undisputed facts and circumstances, the petition for certiorari should be denied.

Respectfully submitted,

THOMAS C. MCCONNELL,
*Attorney for Respondents.*

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## RESPONDENTS' REPLY TO PETITIONERS' BRIEF.

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### A.

### There Was No Error in the District Court's Ruling on the Estoppel Issue Because the Conspiracy Allegations of the Original Complaint Were Res Judicata.

Petitioners' brief is nothing more than a reargument of contentions exhaustively presented to the Circuit Court of Appeals in briefs and oral argument. As we understand

the issues which can properly be presented by petition for certiorari, the mere assertion of error in the decision of the case is not a ground for the issuance of the writ. Nevertheless, since there is no error in the record we do not wish to permit petitioners' claim in this respect to go unchallenged.

Petitioners attempt to torture the record into a showing that there are involved two separate and individual suits presenting distinct and substantively different forms of action. Petitioners must take this position because they solemnly admitted, both in the trial court and in the reviewing court, that unless two "substantively distinct" causes of action were presented, the factual issues were concluded by the jury's verdict and the resulting judgment (Rec. 1, pp. 136-137; 6, p. 52).

As pointed out by the reviewing court, an examination of the allegations of the original complaint conclusively refutes petitioners' contention. One set of allegations is there set forth as the basis for two forms of relief against the same wrong (Rec. 1, p. 2-11). Both requests for relief are predicated on the same violation of the anti-trust laws. The substantive rights of respondents alleged to have been violated by petitioners are the same for both forms of relief. *Proof of damages to the date of the original complaint constituted proof of threatened damage to respondents' business in the future.*

The test for determining whether, for the purposes of applying the doctrine of *res judicata*, the causes of action are the same is whether the evidence in the first hearing would sustain the relief asked on the second hearing. See *Stone* v. *U. S.*, (C. C. A. 9) 64 Fed. 667, 671; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 321, 71 L. Ed. 1069, 1072; *U. S.* v. *California & Oregon Land Co.*, 192 U. S. 355, 48 L. Ed. 476. The reviewing court has expressly held that

the very same proof which this court held sufficient to sustain the money judgment also entitled respondents to the equitable relief (Rec. 1, p. 327).

In the case of *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 626-7, 77 L. Ed. 1405, 1409-10, this Court said:

> "The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding. * * * These views render unnecessary any consideration of the merits of the controversy."

When the reviewing court found on the entire record that "The original complaint stated but one cause of action which, if proved, entitled the plaintiffs to two kinds of relief, namely, damages and an injunction", that ended the estoppel issue. As stated by this Court in *Local 167* v. *U. S.*, 291 U. S. 293, 298, 54 S. Ct. 396, 399, 78 L. Ed. 804, 809:

> "The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties."

The decision of the reviewing court is, therefore, tantamount to affirmance of the District Court's ruling that the doctrine of *res judicata* concluded the factual issues. It also disposes of any further contention that there was no basis for the findings of the trial court because, as stated by this Court in *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319, 71 L. Ed. 1069, 1071:

> "The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, *not only in respect of every matter which was actually offered and received*

*to sustain the demand, but also as to every ground of recovery which might have been presented.*" (Italics ours.)

However, petitioners attempt to avoid the conclusive effect of *res judicata* by arguing a distinction between that doctrine and estoppel by verdict. Even here there is no merit in their contention because the cases they cite at page 22 of their brief all hold that it may be shown by evidence, such as was introduced in this case, just what issues were actually decided. We submit that no better evidence is admissible or possible than the admission of the petitioners themselves as to what issues had been adjudicated by the jury's verdict.

In the instant case, as we have already pointed out, petitioners not only admitted but they argued on the previous appeal that the jury's verdict had adjudicated that the entire system of release was illegal (Rec. 5, pp. 345-358). They thus construed the verdict themselves, and that evidence was before the District Court on the estoppel issue. They said as late as the last hearing in the reviewing court that they "do not deny that the jury found that they had violated the anti-trust laws or that plaintiffs are entitled to an injunction" (Rec. 6, p. 260).

This left the reviewing court where it was dealing with convicted wrongdoers quarreling with the terms of a decree entered by a trial court which had complete familiarity with the conspiracy and an experience with the case extending over four years.

The further arguments contained in petitioners' brief pertaining to estoppel simply reassert their contentions on factual issues adjudicated against them by the trial court. In view of the independent finding of the District Court that all of the acts enjoined were illegal and threatened injury to respondents' business (Rec. 1, p. 280) the peti-

tioners' further arguments on the estoppel issue are irrelevant and completely beside the point.

B.

**The District Court Did Review the Evidence Independently as a Chancellor in Determining the Nature and Kind of Equitable Relief to Be Granted.**

As we have pointed out in the answer to the petition, the trial court heard four weeks of testimony and examined the numerous documents in the case while sitting as a chancellor before determining the disposition and the form of the equitable relief. As we have pointed out, petitioners closed their case on the equitable issues by presenting their own findings and their own form of decree (Rec. 4, p. 2179). Petitioners argued all the factual contentions exhaustively before the court and jury (Rec. 3, pp. 1162-1260) and before the court on motions for a directed verdict (Rec. 2, pp. 579-591), on motions for a new trial (Rec. 4, pp. 2121-2189), and on the hearing as to the form the decretal orders should take (Rec. 1, pp. 207-278).

After all of these hearings the District Court, sitting as a chancellor, entered the following finding (Rec. 1, p. 280):

> "That plaintiffs have already suffered substantial damages because of the several acts hereinafter specifically enjoined and will continue to suffer further injury and damage to their business in the operation of the Jackson Park Theatre unless the operation and continuance of defendants' conspiracy, combination and monopoly referred to in paragraph II hereof is enjoined."

This finding was required to be made on the independent judgment of the chancellor by Rule 65(d) of the Federal Rules of Civil Procedure which provides:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance * * *."

The finding referred to above not only disposes of all of petitioners' argument about their not having had a hearing on the merits of the injunction issue but also of their attempt to make it appear that there were no findings that the acts enjoined threatened injury to respondents' business. The finding further gave the reviewing court the right and opportunity to review the entire record *de novo* and to determine that "a consideration of all the evidence will support its (the District Court's) findings without question."

It should be apparent from the above that petitioners' contention on the constitutional questions has no merit whatever and that if a fair statement of the way in which the equitable issue was heard had been made in their petition no answer would have been necessary. The lack of merit in petitioners' contention would then have been apparent on the face of the petition.

## C.

### The Form of the Decree Was Within the Sound Judicial Discretion of the District Court and Where, as Here, the Public Interest Is Adequately Protected the Decree Should Not Be Reviewed by Certiorari.

The reviewing court, in referring to the exercise of the trial court's discretion with reference to meeting a proven conspiracy said (Rec. 1, p. 327):

> "The court, with this situation in mind, shaped its decree in a fashion to meet it. In this regard the court had a wide discretion. *U. S.* v. *Crescent Amusement Co., et al.*, 323 U. S. 173, 185, 65 S. Ct. 254, 89 L. ed. 160; *Ethyl Gasoline Corporation, et al.* v. *U. S.*, 309 U. S. 436, 461, 60 S. Ct. 618, 84 L. ed. 852; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 725, 728, 64 S. Ct. 805, 88 L. ed. 1024.
>
> "The decree was properly drawn to meet the acts

committed under the conspiracy and threatened. The court was authorized to impose such further restraints as would prevent an evasion. All doubts were resolved in favor of the plaintiffs. *Local 167* v. *United States, supra,* 291 U. S. at 293, 299."

We submit that there can be no possible basis for reviewing by certiorari propositions of law so manifestly sound. The discretion of the trial court has been exercised in a way to protect the public interest by effectively stopping the conspiracy. It is axiomatic that no possible public interest can be served by delaying the effective date of the relief while the matter is further reviewed on certiorari. The granting of the writ, even though it would undoubtedly result in the affirmance of the District Court's decree, will work against the public interest by permitting petitioners further time to profit at the public's expense by their operations under "this oppressive conspiracy."

The entire argument with reference to the terms of the decree advanced here and in the courts below is, in the final analysis, merely concerned with an attempt by petitioners to raise an equity in their own violation of the antitrust laws and thus deprive respondents and the public of effective relief by a plea of hardship to themselves in complying with the law.

As stated by this Court in *U. S.* v. *Crescent Amusement Corp.*, 323 U. S. 189, 89 L. ed. 160, 172: "Those who violate the act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." In other words, there can be no equity predicated upon petitioners' violation of the antitrust laws.

This petition for certiorari comes from convicted wrongdoers, intent on keeping their illegal scheme in operation for as long a time as possible. As the opinion of the reviewing court so conclusively shows, each item of the relief

was warranted and necessary and its entry constituted no abuse of discretion on the part of the trial judge.

## Conclusion.

This litigation has been in the courts for over five years. Every conceivable theory of fact and law has been advanced in support of petitioners' effort to gain legal sanction for an illegal method of doing business. Petitioners have had not only "their day" but have had years in court. No basis for the issuance of a writ of certiorari has been shown. While petitioners now profess great concern over the public interest in the need for "an exercise of this Court's power of supervision," it is manifest that they seek a complete review and reversal of uniformly adverse decisions on questions of fact. This Court has repeatedly stated that certiorari is not a proceeding to be used merely as a method to afford "the defeated party in the circuit court of appeals another hearing."

To grant this petition only burdens this Court with a further review of factual and discretionary issues adequately, conscientiously and correctly dealt with by the lower courts. The public's interest has been adequately protected and the relief thus afforded should, in the public interest, be no longer delayed. No question of public importance is now presented, no important question of Federal law is raised, no conflict in authority between the various Circuit Courts of Appeal is shown, and petitioners have obviously been deprived of no constitutional right.

We most respectfully suggest that it is in the public's interest that this petition for certiorari should be denied.

Respectfully submitted,

THOMAS C. MCCONNELL,
*Attorney for Respondents.*